

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	<b>No. 27287-7-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
REAVONNA DIANE OTT,	)	
	)	
<b>Appellant.</b>	)	<b>UNPUBLISHED OPINION</b>

Korsmo, J. — Police responded to a telephone call concerning suspicious behavior behind a shopping mall. After determining that nothing untoward was occurring, they detained appellant Reavonna Ott and her friends a short while longer to learn their identities and check for warrants. We conclude that the continued detention was improper and reverse Ms. Ott’s conviction for possession of methamphetamine.

**FACTS**

The employees of a hair-cutting salon, which was the only business still open in a Kennewick strip mall, could hear voices behind their building, but could not see anyone

because the speakers were behind the dumpster. Concerned about people lurking in the area as they were getting ready to close for the night, the employees placed a 911 call about suspicious persons shortly before 9:00 p.m.

Four officers responded; Detective Joshua Kuhn was one of the responders. It was getting dark when he pulled his car into the parking lot and observed Ms. Ott and two men sitting on a grassy area against a fence behind the mall. While the three were visible to the detective from his angle of approach, the hair salon employees could not have seen them from their building. Two officers contacted the store employees. Detective Kuhn and his partner contacted the three people on the grass and advised why he was present. They freely told him they were just talking.

Apparently accepting that explanation, Detective Kuhn asked the three to identify themselves for purposes of documenting who he had contacted for his report. One of the young men stood up to provide his identification. He was instructed to remain seated. One of the young men produced written identification and one orally identified himself. Ms. Ott, the last person queried, identified herself in some manner. The detective could not remember if she orally provided her name and date of birth, or if she provided written identification. Ms. Ott testified that she handed over her identification.

The detective reported the identification information. Each of the three had

warrants and each was arrested. During a search of Ms. Ott incident to her arrest, a pipe with burned methamphetamine residue was discovered. She subsequently was charged with possession of a controlled substance.

Ms. Ott's counsel moved to suppress the evidence, arguing that the officers lacked suspicion of wrong-doing to justify a *Terry*<sup>1</sup> stop. After hearing the testimony, the trial court concluded otherwise. Ms. Ott was on business property without a valid business purpose and it was reasonable for the police to briefly detain her while they sorted out what was occurring.

The trial court entered appropriate findings. Ms. Ott was convicted on stipulated facts and sentenced to 15 months in prison. She then appealed to this court.

#### ANALYSIS

This court will treat as verities the trial court's factual findings following a CrR 3.6 hearing if they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Review of a trial court's legal conclusions is *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Here, the parties do not contest the court's factual findings. The issue, instead, is the legal conclusion to be drawn from the facts of this case.

A person is seized within the meaning of the Fourth Amendment when a

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

reasonable person would believe that he or she is not free to leave the scene. *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980). An officer may seize a person to investigate whether or not a crime has occurred if the officer has an articulable suspicion, based on objective facts, that a person has or is about to commit a crime. *Terry*, 392 U.S. at 21; *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The detention, however, should be brief. *State v. Williams*, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984). The United States Supreme Court once noted:

This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

*Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983). The State bears the burden of proving that a stop “was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.” *Id.* An officer conducting an investigatory stop may ask a suspect to identify himself. *Id.* at 501; *Wheeler*, 102 Wn.2d at 741.

We examine the facts of this case with these principles in mind. The officers were responding to a report of “suspicious activity” consisting of voices from unseen persons behind a mall; most of the businesses were closed. Detective Kuhn could see as he drove up that three people were seated on the grass talking. There is no indication that when he

and his partner approached they observed any suspicious behavior. There is no evidence that the three attempted to flee or conceal themselves. They did not possess weapons or burglary tools. They freely admitted what the officers had already observed — they were simply sitting on the grass talking.

The officers did not seize the threesome simply by walking up to them and asking what was going on. *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994). The officers could also properly ask the three to identify themselves. *Royer*, 460 U.S. at 501. The nature of the encounter changed, however, when the officers prohibited the young man from standing in order to produce his wallet. At that point it objectively was clear that the threesome was not free to leave and, thus, had been seized. *Mendenhall*, 446 U.S. at 554. To justify the seizure, there had to be evidence suggesting that a crime either was being committed or contemplated. *Terry*, 392 U.S. at 21. There was no evidence of either.

The store employees were understandably concerned about strange voices coming from an area where they would not be expected. It was reasonable to call the police to assure that they would not be assailed when they left the business with the day's sales receipts in hand. The officers properly checked out the complaint. Missing, however, was any overt evidence that criminal behavior was afoot. In the absence of evidence

suggesting criminal activity, it was error to seize the threesome and require them to maintain themselves sitting in the grass.<sup>2</sup> While the officers may have been awaiting word from the other officers who were talking to the store employees, conclusion of the other portion of the investigation was not itself a basis for seizing the three people in the back. Similarly, detaining people to learn their identity is not proper without articulable suspicion of wrongdoing. *State v. Cole*, 73 Wn. App. 844, 850, 871 P.2d 656, *review denied*, 125 Wn.2d 1003 (1994).

Respondent cites several cases standing for the proposition that officers can run warrant checks during the course of an investigatory detention. *E.g.*, *State v. Reeb*, 63 Wn. App. 678, 680-681, 821 P.2d 84 (1992); *State v. Williams*, 50 Wn. App. 696, 700, 750 P.2d 278 (1988); *State v. Sinclair*, 11 Wn. App. 523, 529, 523 P.2d 1209 (1974). We agree. The key factor in each of those cases, however, was that officers had articulable suspicion of wrongdoing or probable cause to arrest at the time the warrant checks were conducted. Here, the officers lacked articulable suspicion of wrongdoing. The radio report of suspicious voices behind a mall simply did not articulate criminal behavior. The police follow-up investigation showed that nothing was amiss. Under those circumstances, there was no basis to seize Ms. Ott and her friends.

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<sup>2</sup> “A person stopped on reasonable suspicion must be released as soon as the officers have assured themselves that no skullduggery is afoot.” *United States v. Childs*, 277 F.3d 947, 952 (7th Cir.), *cert. denied*, 537 U.S. 829 (2002).

We do not believe the facts justified the seizure that occurred. Accordingly, the trial court erred in determining that this incident was a proper *Terry* stop. The motion to suppress should have been granted and the evidence of the methamphetamine residue suppressed.

The conviction is reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Sweeney, J.